

**(2005) 11 AHC CK 0172**

**In the Allahabad High Court**

**Case No :** Criminal Miscellaneous Application No. 15919 of 2005

Chhotey

APPELLANT

Vs

State of U.P. and Ram Snehi Rajkwar

RESPONDENT

**Date of Decision :** 16-11-2005

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 311, 313, 482

Evidence Act, 1872 — Section 165

Penal Code, 1860 (IPC) — Section 302

**Citation :** (2006) CriLJ 711

**Hon'ble Judges :** K.N. Ojha, J

**Bench :** Single Bench

**Advocate :** A.K. Dixit and K.S. Tiwari, for the Appellant; A.G.A., for the Respondent

**Final Decision :** Dismissed

## Judgement

K.N. Ojha, J.—Instant application u/s 482 Cr.P.C. has been moved by Chhotey, resident of Mohalla Madhiya, Naka, police station Kotwali Nagar, district Banda, to set aside the order dated 30.9.2005 passed by learned Sessions Judge, Banda, in S.T. No. 254 of 2003, State v. Shobhit Chaturvedi and Ors. whereby application 186 Kha moved by the accused Applicant was rejected and objection 188 Kha filed by learned D.G.C. (criminal) against the application 186 Kha was allowed. Application 186 Kha was moved to recall the order dated 26.7.2005 whereby the learned Sessions Judge suo-motu directed PW 6 Siraj Ahmad, Investigating Officer to be reexamined on some points.

2. Heard Sri K.S. Tiwari, learned Counsel for the applicant, learned AGA and have gone through the record.

3. The fact of the case is that S.T. No. 254 of 2003, State v. Shobhit Chaturvedi and Ors. is pending in the Court of Sessions Judge, Banda, u/s 302/34 I.P.C. police station Kotwali Nagar, Banda, against the accused persons including accused Chhotey, applicant. After the case was committed to the Court of

Sessions Prosecution examined its fact and formal witnesses. The statements of accused were recorded u/s 313 Cr.P.C. The defence also closed its evidence and thereafter the trial was fixed for argument. During the argument it was found by the learned Sessions Judge that report about the death of Awadhesh @ Pota was sent from the District Hospital, Banda, to the police station Kotwali, which was registered at G.D. Report No. 9 of 6.8.2003 at 8.00 P.M. The G.D. report was not proved by the prosecution. The learned Sessions Judge during the course of argument felt that examination of Investigating officer Siraj Ahmad, PW 6 was necessary. He also found that statement of constable concerned, who carried the information etc. was also necessary as perusal of GD in evidence was relevant for disposal of the trial. Therefore, he directed for reexamination of PW 6 Siraj Ahmad, Investigating Officer, on this point and also the statement of the constable concerned. Aggrieved there from the applicant - accused moved application to recall the order dated 26.7.2005, which was opposed by the learned D.G.C. (criminal). After hearing the learned Counsel for both the parties the learned Sessions Judge rejected the prayer of the accused-applicant on 30.9.2005, therefore, instant application u/s 482 Cr.P.C. has been moved.

4. Two fold objections have been raised by the learned Counsel for the applicant. Firstly that at the verge of the conclusion of the trial the learned Sessions Judge was not entitled to summon the Investigating Officer again to get him reexamined on some points on which the prosecution has not examined him and the stage was over. The second argument of the learned Counsel for the applicant was that even if proof of the G.D. be relevant, still it is to fill up the lacunae of the prosecution evidence, which cannot be done by the Court.

5. In order to ascertain the facts of this case mention of some provisions of law is necessary.

6. Section 165 of Indian Evidence Act, 1872 provides as below:

165. Judge's power to put questions or order production:- The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant, and may order the production of any document or thing, and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question.

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved.

Section 311 of Cr.P.C. contemplates as below:

311. Power to summon material, witness, or examine person present:- Any Court may, at any stage of inquiry, trial or other proceeding under this Code, summon any person as a witness or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined;

and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

7. Thus from these provisions of law it is clear that if Court finds any fact or evidence necessary for just decision of the case, the Court can summon or reexamine any witness at any stage of the case before the judgment is delivered. Even if the judgment is reserved and while writing judgment the Court finds that any material point is omitted and consideration of which is necessary, therefore, the paper is required to be proved, the Court can pass order for examination or reexamination of the witnesses. Thus there is no restriction on the power of the Court. u/s 311 of Cr.P.C. Court has unrestricted powers to summon and examine a witness. It is not only prerogative but also plain of a Court to examine such of those witnesses, as it considers necessary for doing justice. The Court has a duty to arrive at the truth by all lawful means. The Court cannot evade its statutory duty far to consider whether the evidence of any witness left out by the parties is essential or not. Thus the Court may summon any witness and if the prosecution declines to examine then the Court may act on its own initiatives. The power of the Court u/s 311 of Cr.P.C. cannot be curtailed at any stage as long as the trial is under consideration before the Court. The object is that there may not be failure of justice on account of mistake of either party in bringing the material evidence on record. If it is essential to the just decision of the case the Court is under duty to exercise the power.

8. In this case the trial is proceeding u/s 302 I.P.C., which is heinous offence. The information is said to have been given by the Hospital to the police station about the death of the person, who was injured and later on died in the hospital. The information of the death was for the first time given by the Hospital to the police station. If while hearing argument the learned Sessions Judge finds that proof of this paper was necessary and there were certain other points on which statement of Investigation officer and constable was relevant and necessary, The Court has the duty to exercise power as has been conferred by abovementioned sections of the Indian Evidence Act and Criminal Procedure Code. It cannot be said to fill up lacunae of the prosecution evidence because evidence is already there. It is the case of the prosecution since very beginning that the information was given by the Hospital to the police station about the death of the victim. Thus lacunae is not such where there was no evidence or the Court is creating any evidence. What is required is that the evidence, which was already there, should be brought on record and by reexamining the Investigating officer and examining the constable the evidence can be read in evidence in accordance with law.

9. Therefore, if the learned Sessions Judge passed the order for reexamination and examination of the witnesses, as mentioned above it is not to fill up the lacunae as to cause injustice to the accused but it is regarding such evidence, on the basis of which the Court will arrive at a just conclusion in the case.

10. The learned Counsel for the accused-applicant has cited (40) 2000 ACC 311,

Mohd. Husain Umar Kochra etc. Vs. K.S. Dalipsinghji and Another etc., , Mohd. Hussain Umar Kochra v. K.S. Dalipsinghji, was followed and it was held that "there can be no quarrel with this proposition that power of the Court is plenary to summon or even recall any witness at any stage of the case if it considers it necessary for a just decision. But the said ruling cannot be relied on as laying down the principle that a witness whose evidence has already concluded after cross-examination at the behest of the accused on the basis of the affidavit filed by him subsequently which is at variance to what he stated on oath before the Court." Thus in this case it was held that the witness should not be recalled for further, cross-examination u/s 311 Cr.P.C. if affidavits are filed by the witnesses subsequent to their statement made in the Court. It was also held that the Court has plenary power to summon or recall any witness at any stage u/s 311 Cr.P.C. if there exists justifiable reason to do so in the interest of justice. Thus it is the reexamination or further "cross-examination at the request of the accused in respect of which law has been laid down that the Court should not summon the witness again. Because once the witnesses have made statement, it has become final. In case fact is being brought in evidence and just because some of the witnesses have been won over and filed affidavits subsequent to their statement, there is no new ground, which is omitted in the evidence or was not such point, which the Court finds it material to be considered, hence the witnesses should not be summoned. But in instant case neither prosecution moved application to get the G.D. proved nor any witness was examined on this point on which reexamination is required to be made. Therefore, the law laid down in the above cited case by Hon"ble the Apex Court and of the Division Bench of this Court is of no avail to the applicant.

11. The applicant has also relied on Mishrilal and Others Vs. State of M.P. and Others, wherein Hon"ble the Apex Court held that when some witness made statement in the murder case before the Sessions Judge and subsequently in the same crime they made contradictory statement in juvenile Court in respect of juvenile accused and in. Juvenile Court such prosecution witness did not support the prosecution, therefore, the accused moved application to summon those witnesses, who were already examined by the Sessions Court so that they could be confronted with the statement, which were made by them in the Juvenile Court. The Hon"ble Apex Court held that this prayer of the accused could not be allowed because the Court has to ascertain nothing new and it was just to efface the evidence of the witnesses, who had already made statement before the trial Court.

12. In this case the facts are otherwise. The prayer for reexamination of the witnesses is not being allowed on the request of the accused- applicant or prosecution. While hearing arguments of the learned Counsel for the parties the Court itself arrived at the conclusion that statement of the Investigating officer was to be recorded on G.D. report and some other points and likewise was about the statement of the constable. In the order dated 30.9.2005 the learned Sessions Judge has observed that by reexamination of these witnesses there will

be no prejudice to the accused because as soon as these witnesses are reexamined or examined, opportunity will be given to the defence to cross-examine the witnesses, therefore, to say that there will be prejudice to the accused, because every detail of the points on which the Court wants to make quarry to the witnesses or reexamine the witness is not explained to the accused, is not maintainable.

13. Considering the plenary power of the Court to reexamine or to recall any witness at any stage for just decision of the case, there is no illegality in the impugned order nor any prejudice is being caused when the Court is certain and specific that opportunity to cross-examine is to be given to the accused-applicant.

14. Therefore, instant application moved u/s 482 Cr.P.C. does not yield any fruitful result.

15. The application is dismissed.